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IN THE

Supreme Court of the United States

FALL TERM, A. D. 1953

No. 462

S. L. KILGORE,

Petitioner,

VS.

ALFRED A. McKETHAN, ET AL.,

Respondents

Petition for Writ of Certiorari

BRIEF OF RESPONDENTS

I.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals of the Fifth Circuit affirming an order of a District Court dismissing Petitioner's Complaint against the then Governor of Florida, the then members of the State Road Department as officials and as individuals, and named individuals not holding office, and corporations.

The complaint avers (1) that defendants (respondents) conspired to cause Florida Crushed Stone Company, by whom plaintiff (petitioner) was employed as sales manager of crushed rock to the State, to pay "kick-backs" to be used to reimburse contributors to the campaign fund of the Governor; (2) that the Governor, "by virtue of the power and authority vested in him by the Constitution and laws of the State of Florida, was able, from the time he assumed office, to dictate the policies to be followed by the State Road Department", (the Court judicially knows that there is no such authority); (3) that the Governor did dictate such policies and directed the Chairman of the Department to so operate that the Stone Company would be forced to pay a portion of its income from sales of rock to the Department, for the purpose of paying back some of the contributions which had been made by defendant Griffin and others to the Governor's campaign fund; (4) that petitioner opposed said plan; (5) that the members of the State Road Department set up an off-standard gradation requirement for cover material which they knew the Stone Company could not supply, in order to make them more receptive to the pay-off; and (6) that petitioner was discharged to his damage, for which he sues.

The Complaint does not invoke federal jurisdiction under Title 8, § 43 U. S. C. (tr. 1), but petitioner now invokes said section and bases his argument primarily thereon (br. page 3).

II.

DENIAL OF JURISDICTION

Federal jurisdiction was properly denied by the District Court and Court of Appeals, and no reason for review by this Court is shown because the facts averred do not bring the cause within any of the categories of the Fourteenth Amendment; or 8 U. S. C. § 43; 28 U. S. C. §§ 1343 or 1331, the only provisions cited by petitioner (br. 9).

It is not shown that:

(1) petitioner has been deprived "under color of statute, ordinance, regulation, custom or usage" of Florida "of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress provided for the equal protection of citizens";

(2) equal protection of the law has been denied the plaintiff, or that he has been deprived of property without due process of law;

(3) the discharge by the rock company of the petitioner as its employee was caused by state action, or action by respondents under color of law; or that

(4) a substantial federal question, or question worthy of discretionary consideration by this Court, is presented or involved.

III.

ARGUMENT

(1) State Action Necessary

The sole question presented by the petition for certiorari is whether the complaint states a case within the jurisdiction of the Federal District Court, and the foundation asserted as support for federal jurisdiction is Section 43, Title 8, U. S. Code, imposing civil liability upon every person who, under color of state law, subjects a citizen of the United States to deprivation of some right, privilege or immunity secured by the Constitution and laws of the United States. It clearly appears that the cause of action attempted to be stated in the complaint does not come within Section 43, Title 8.

The history and construction of Section 43, as related to the Fourteenth Amendment and to the provisions of the Civil Rights Act, leaves no doubt that Section 43 is confined and limited to those cases where some right secured to the citizen has been invaded by State action or action under color of state law. This is necessarily so because the Fourteenth Amendment does not purport to grant rights; it is a prohibition against state action which would deprive persons of life, liberty or property, without due process of law, or which would deny the equal protection of the laws.

The section of the Civil Rights Statutes specified in the complaint as the basis of plaintiff's right, is Section 47(3), Title 8, U. S. Code, not Section 43, now relied on. (Tr. 1.) Section 47(3) relates to cases where individuals have conspired to deny a citizen of his rights to equality or equal protection of the laws, and it is

settled that Section 47(3) is confined to cases involving equality. *Collins v. Hardyman,* 341 U. S. 651, 660, 71 S. Ct. 937, 941.

A comparison of the provisions of Section 43 and the provisions of Section 47(3) shows that the one deals with state action or action under the color of state law, whereas the other relates to conspiratorial action of individuals in the limited fields specified. The importance of confining each one of these statutes to its own sphere of operation, has been pointed out in numerous decisions (See *Yglesias v. Gulfstream Park Racing Association, Inc.* (5th Cir.) 201 F. 2d 817, 819, and cases there cited.)

The petitioner's failure to observe this distinction accounts for much of the confusion in his complaint and in his petition for certiorari.

Petitioner cites the due process and equal protection clauses of the Fourteenth Amendment as the basis of his claimed right to work, but nowhere does he claim that he has been denied equal protection of the laws. Because he does not claim denial of equality, Section 47 (3) could not apply. *Collins v. Hardyman,* supra.

Assuming, for purposes of argument, that Kilgore had a right to continue in his employment with the stone company, free from tortious interference by individuals or by official state action, it is obvious that a tortious interference by individuals, even by means of or pursuant to some conspiracy to interfere with or deprive him of his job, could not amount to a deprivation within the protection of Section 43, Title 8, because Section 43 is confined to State action or action under color of state law. (See *Watkins v. Oaklawn Jockey Club* (8th Cir.) 183 F. 2d 440, 443, and cases there cited.)

(2) State Action Not Shown

Searching the complaint for an allegation that the deprivation of which Kilgore complains was the result of state action or action under the color of state law, we find only the allegations contained in paragraph 7 that the defendant members of the State Road Department, acting under power and authority of the laws of the State of Florida, amended the specifications for road and bridge construction so as to set up an off-standard gradation requirement for cover materials which those defendants well knew the stone company could not supply, and which had the practical effect of shutting out the stone company, petitioner's employer, from bidding on some state road work, and that the purpose of closing specifications in this manner was to soften up the stone company and petitioner to make them more receptive to the pay-off arrangement purportedly alleged in other paragraphs (tr. 3 and 4).

Do those allegations show that the petitioner was, by the adoption of this regulation, deprived of any right secured to him by the Fourteenth Amendment or by Title 8, Section 43, U. S. Code?

Said regulation did not touch petitioner nor his right to work. The complaint alleges that, because of Kilgore's hostility to the alleged kick-back arrangement, "pressure was exerted by the defendants upon Henry Camp, President of the . . . Stone Company . . . to discharge plaintiff," and that "said dismissal was brought about as a part and parcel of the aforesaid continuing conspiracy among all of the defendants to this suit and the insistent demands upon Henry Camp by defendants that plaintiff be discharged." (tr. 6). Paragraph 12 alleges that each of the defendants "have conspired to deprive plaintiff of his right to engage in

the gainful employment which he held prior to the time of his unjustified dismissal as sales manager of . . . stone company, all in direct contravention of the provisions of the Constitution and Statutes of the United States." (tr. 6).

It appears, therefore, from the allegations of the complaint, that the claimed deprivation of Kilgore's right to continue in his employment by the stone company, resulted from a conspiracy by all of the defendants to deprive him of that right, not from any state action or action under color of law.

> "The jurisdiction conferred by the Civil Rights Act is narrowly limited. 8 USCA § 43."

Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954.

Color of Law. Petitioner does not and could not cite any statute of Florida giving or appearing to give the Governor the power to direct the State Road Department to collect the alleged kick-back or to otherwise control said department. No such statute exists.

The Road Department, of course, had the power to change the specifications for surfacing materials, and it was its duty to do so if better construction could be thereby secured. For example, it is well known that penetration of water causes roads built of crushed stone to deteriorate, and if a better surfacing formula was devised to shed water, the department properly adopted it. But where, in the alleged circumstances, can there be found "color of statute" for the Governor, or the State Road Department, to cause the stone company to discharge the petitioner?

This Court, in *McCain v. City of Des Maines,* 174 U. S. 168, 19 S. Ct. 644, on page 646, says:

> " 'Color of law' does not mean actual law. 'Color', as a modifier, in legal parlance, means *'appearance,* as distinguished from reality.' Color of law means 'mere *semblance* of legal right.' Kin. Law Dict. & Gloss." (emphasis supplied)

This is the definition generally used. (See "Color of law", WORDS & PHRASES, Perm. Ed. Vol. 7-A, p 301.)

The words "appearance" and "semblance" are too well understood to require defining. Hence, if officers perform an act outside of any appearance or semblance of official power, such act is not under color of law. The discharge of the petitioner by the stone company falls in that class, even if officer defendants suggested that he be discharged. "Color of law" refers to official power, not personal persuasion. Moreover, there is a manifest lack of causal connection between the act of the Road Department in changing the specifications of surfacing materials, and the discharge of the petitioner by the stone company. The claim that it was necessary to procure petitioner's discharge in order to induce the stone company to contribute is too far-fetched, indirect and unreasonable to merit consideration. The whole situation considered, makes apropos the last paragraph of the opinion of *McCain v. City of Des Moines,* supra, namely:

> "The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it consitutes not even a color for the jurisdiction of the circuit court."

The cases cited in petitioner's brief beginning on page 29 headed "The Abuse and Misuse of State Conferred Power", etc., illustrate our point that the power

possessed by virtue of state law must be such as to give color or appearance of official power to perform the unlawful act complained of.

The leading case, *U. S. v. Classic,* 313 U. S. 299, 61 S. Ct. 1031, involved a fraudulent count and certification of votes by election officials between candidates for Congress. The officials had the power and duty to canvass the vote and certify the returns. Hence, when making the canvass they acted within their power, and when they falsified the returns they exceeded their power but acted under color of law.

In *Screws v. U. S.,* 325 U. S. 91, 65 S. Ct. 1031, a sheriff and policeman arrested a person and beat him so severely that he died. They had the statutory power to arrest and to make that arrest effective by using such force as necessary. Hence, by the use of unnecessary force, they exceeded their power but acted, nevertheless, under color of power (law). So with other cases in petitioner's brief.

This Court in *Harry Spalding v. William F. Vilas,* 161 U. S. 483, 40 L. Ed. 780, in considering lawful acts of the Postmaster General allegedly performed with malice, which deprived plaintiff of fees as an attorney, said:

> "As in the case of a judicial officer, *we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control . . .*" (P. 498) (emphasis supplied)

It was palpably beyond the authority of the Governor and members of the Road Department to interfere with petitioner's employment by the stone company, hence if they did interfere it was not under color of law.

Motive. The lawful acts of respondents were not made unlawful by a malicious motive, if such existed.

Harry Spalding v. William F. Vilas, supra

DesLauries v. Shea, et al., 13 N. E. 2d 932

Dalury v. Rezinas, 170 N. Y. S. 1045

The New York case defines conspiracy as—

". . . an agreement . . . to do an *unlawful* act."

IV.

PETITIONER'S BRIEF

The suit is for *damages* growing out of the alleged tortious conduct of respondents in procuring petitioner's employer to discharge him. The authorities hold that compensatory damages in such cases cannot be recovered unless the wrong complained of is the proximate cause of the injury alleged.

It is apparent, and we have demonstrated, that there is no causal connection between the alleged acts of the respondents and the alleged injury to the petitioner, and that the effort to connect them is too farfeched. Hence, no cause of action in the Federal Court is stated.

On page 11 of his brief, counsel says:

"Jurisdiction under 28 U. S. C. Section 1343 (3) clearly exists *if the complaint states a cause of action under 8 U. S. C. Section 43.*" (emphasis supplied)

We have demonstrated that no cause of action is shown because, among other reasons, state action or action under color of state law, has not been made to appear, and that Section 47 (3), Title 8, does not apply. We have shown that there has been no abuse or misuse of state-conferred power, but an alleged entire departure from such power or color thereof.

Petitioner says:

". . . the respondents who were state officials and employees misused their official powers to procure the dischrage of petitioner and *thus to insure* the collection of the kick back from his company by changing specifications" etc. (Br. p. 9) (emphasis supplied)

This statement summarizes petitioner's case and shows that he has no case.

If the stone company could be induced to discharge petitioner and pay the kick-backs, it would have paid without discharging petitioner if the stone company desired his further services. His discharge could not "insure" such payment, and manifestly was not the object of the alleged conspiracy.

A deluge of suits. For this Court to take jurisdiction of this cause would invite actions, appeals and petitions in causes without number. Many persons, aggrieved by discharge from employment—or having contract or imaginary civil rights violated—would be encouraged to appeal to the federal courts, including this Court, and from highest State Courts to this Court. In this case petitioner sued in the State Court also (tr. 7).

The field of due process, equal protection, and rights, privileges and immunities secured by the Constitution and laws of the United States is so broad and allows so much room for imagination, as to require a scrupulous screening of the cases presented to federal courts, and especially to this Court, in order to prevent total inundation of the federal judicial system.

CONCLUSION

We therefore submit that the petitioner does not present a case of substantial federal jurisdiction, or a case worthy of review by the highest court of the land, and that the petition should be denied (1) because it is without merit, and (2) under the discretionary power of this Court, even if some merit should appear.

Dated December 16, 1953.

Respectfully submitted,

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